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AF/3727

P&G Case 8363M

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of	:	
Mary Carmen Gasco, et al.	:	Confirmation No. 7279
Serial No. 10/010,818	:	Group Art Unit 3727
Filed December 6, 2001	:	Examiner S. J. Castellano

For A SHAPED CONTAINER BOTTOM

BRIEF ON APPEALS

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Enclosed, pursuant to 37 C.F.R. 1.193(b)(2)(ii), is Supplemental Appellant's Brief on Appeal for the above application. The Brief is being forwarded in triplicate.

The Director is hereby authorized to charge the above fee, or any additional fees that may be required, or credit any overpayment to Deposit Account No. 16-2480 in the name of The Procter & Gamble Company. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

By _____
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Date: July1, 2004

Customer No. 27752

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450 on July 1, 2004.

Theodore P. Cummings, Esq. 40,973
Name of Attorney Registration No.

Signature of Attorney

8363M

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No.:		10/010,818
Appellant(s)	:	MARY CARMEN GASCO, ET AL.
Filed	:	December 6, 2001
Title	:	A SHAPED CONTAINER BOTTOM
TC/A.U.	:	3727
Examiner	:	S. J. Castellano
Conf. No.	:	7279
Docket No.	:	8363M

SUPPLEMENTAL APPEAL BRIEF

Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir,

This Supplemental Appeal Brief is submitted in response to the Examiner's Non-Final Office Action dated May 5, 2004. By such filing Appellants hereby formally request reinstatement of their appeal under 37 CFR § 1.193(b)(2)(ii) which appeal was originally filed on January 8, 2004.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio. The Inventors who are Mary Carmen Gasco, Shane Edwin Meeker, Ronald Peter DeVlam, Mark William Rakentine, Pat Lee O'Brien, Jean-Marc Henri Kirouac, and Janet Adele Veith assigned their interest to The Procter & Gamble Company which was recorded on August 19, 2002, reel 013505, frame 0407.

RELATED APPEALS AND INTERFERENCES

This is a supplemental appellate brief to the original appellate brief filed on February 17, 2004. This supplemental appellate brief has been necessitated by the Examiner's attempted re-opening of prosecution under 37 CFR § 1.193(b)(2). In answer to the Examiner's office action dated May 5, 2004, this supplemental appellate brief has been filed. There are no other related appeals or interferences known to the Appellants, or known to Appellants' legal representative

that will directly affect, be directly affected by, or that will have a bearing on the Board's decision in the present appeal.

STATUS OF CLAIMS

Claims 1 and 3-20 are pending and stand rejected. A copy of these claims, which are being appealed, appear in Appendix I herein.

STATUS OF AMENDMENTS

No amendments are currently outstanding.

SUMMARY OF THE INVENTION

In one aspect, the invention relates to a shaped container bottom for containing a plurality of curved snack pieces, each snack piece having a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel having a concave-curvature about a first axis of the bottom panel, wherein the concave-curvature of the bottom panel substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of a lowest snack piece of the plurality of snack pieces rests upon the bottom panel. (Appellants' Specification, page 2, lines 14-19).

In another aspect, the invention relates to a shaped container bottom for containing a plurality of curved snack pieces, each snack piece having a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel comprising at least two base portions and a bottom panel center disposed between the base portions, the bottom panel center having a concave curvature about a first axis of the container, wherein the concave-curvature of the bottom panel substantially conforms to the curvature of the snack pieces and a peripheral edge of a lowest snack piece of the plurality rests upon the flat portions. (Appellants' Specification, page 2, lines 20-26).

In yet another aspect, the invention relates to a process for filling a container with curved snack pieces, the process comprising providing a container having a shaped bottom that conforms to the shape of the snack pieces and introducing the snack pieces into the container such that the pieces self align because of the shape of the container bottom. (Appellants' Specification, page 2, lines 27-30).

ISSUES

Appellants present the following issue for consideration on appeal:

I. Whether the rejection of Claims 1, 3-5 and 10 under 35 U.S.C. § 102(b) as being anticipated by Beall (U.S. Patent No. 3,956,510) is proper?

II. Whether the rejection of Claims 1, 3-5 and 10 under 35 U.S.C. § 102(b) as being anticipated by Beall (U.S. Patent No. 3,852,485) is proper?

III. Whether the rejection of Claims 1 and 3-20 under 35 U.S.C. § 102(b) as being anticipated by Baur, et al. (U.S. Patent No. 3,498,798) is proper?

IV. Whether the rejection of Claims 1, 3 and 4 under 35 U.S.C. § 102(b) as being anticipated by Ruiz (U.S. Patent No. 4,873,099) is proper?

V. Whether the rejections of Claims 6-9 under 35 U.S.C. § 103(a) as being unpatentable over Beall (U.S. Patent No. 3,956,510) in view of Beall (U.S. Patent No. 3,852,485) are proper?

VI. Whether the rejections of Claims 6-9 under 35 U.S.C. § 103(a) as being unpatentable over Baur, et al. (U.S. Patent No. 3,498,798) in view of Griffith (U.S. Patent No. 4,011,347) is proper?

GROUPING OF CLAIMS

Claims 1 and 3-20 stand or fall together.

ARGUMENTS

I. Whether the rejection of Claims 1, 3-5 and 10 under 35 U.S.C. § 102(b) as being anticipated by Beall (U.S. Patent No. 3,956,510) is proper?

Claims 1, 3-5 and 10 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Beall (U.S. Patent No. 3,956,510--hereinafter Beall '510).

The Examiner states that Beall '510 discloses a shaped container bottom integral to a container in combination with curved snack pieces therein, the snack pieces comprising a center radius, a center height, a peripheral edge an a lower surface. The Examiner further states that the snack pieces are located within a container, the container bottom comprising a bottom panel having a center radius, a center height and a concave-curvature about a first axis of the bottom panel. The Examiner concludes by stating that the concave-curvature substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of a lowest snack piece rests upon the bottom panel.

Appellants note that a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.[1] The identical invention must be shown in as complete detail as is contained in the claim.[2] The elements must be arranged as required by the claim.[3]

Appellants re-introduce their Claim 1 with certain portions thereof underlined for emphasis:

> A shaped container bottom integral to a container for containing a plurality of curved snack pieces, each snack piece having a center radius, a center height, a saddle height, a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel having a center radius, a center height, and a concave-curvature about a first axis of the bottom panel, wherein the concave-curvature of the bottom panel substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of a lowest snack piece of the plurality of snack pieces rests upon the bottom panel.

Appellants' respectfully assert that Beall '510 does not anticipate Appellants' claims. Beall '510 is missing several elements which are resident within Appellants' Claim 1 to which Claims 3-5 and 10 depend. First, Beall's '510 snack pieces do not have Appellants' saddle height as an element, because Beall's '510 snack pieces are not saddle shaped as are Appellants'. Beall's '510 snack pieces are single curved and thus do not possess Appellants' saddle shape. Next, the so-called curvature of the Beall '510 package does not conform to the curvature of Beall's snack pieces. Rather, the curvature of Beall's 510 package conforms only to the outer edge of the snack piece and not the inner single curved region of Beall's 510 snack piece. Figure IV of Beall '510 shows their single-curved snack piece. Figure III shows that Beall's '510 snack pieces are fitted within one-another in a circular array such that the curved portions thereof never conform to the bottom panel of Beall's '510 package. In Appellants' view, the omission of this element is fatal. Furthermore, there is no 'lowest snack piece' in Beall '510 on which all other snack pieces are stacked. Instead, all of Beall's '510 snack pieces are stacked in the same plane and at the same height as each snack piece aligned in Beall's 510 circular array.[4]

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[1] Verdegaal Bros. V. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).
[2] Richardson v. Suzuki Motor Co., 868 F. 2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).
[3] In re Bond, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990).
[4] Beall (U. S. Patent No. 3,956,510); Figure III.

Furthermore, Appellants assert that the positioning of their curved bottom in their package necessitates that Appellants' snack pieces will be stacked onto one-another.[5] Beall '510 expressly disclaims this possibility in several places. For example, please note the following:

> It is an essential element of the present invention that the chip products to be packaged are thin and substantially uniform in shape and size so they may be nested one within the other to form a loop, preferably a closed loop Desirably, the closed loop is in the form of a circular array.[6] [Emphasis added.]
>
> Another possible package for chip type snacks of uniform shape and size involves vertically stacking the chips one upon the other to form a straight column....[i]t has been found that when such container is dropped on its bottom...the chips nearest such end tend to break. Broken chips do not normally meet with consumer acceptance.[7] [Used as explanation for Beall '510 not stacking their chips one on top of another.]
>
> Thus the present invention provides a circular array or a loop array of nested chips which is highly resistant to breakage. The present invention provides packaging which is suitable for maintaining the chips in such a loop or circular array.[8] [Emphasis added.]

From the above quotes in Beall '510, it is readily seen that the curvature of Beall's '510 snack pieces are not meant to conform to the curved panel in Beall's '510 package. Beall '510 states in several places that such a stacked array (i.e., one on top of another) promotes breakage and is therefore not Beall's '510 aim.

Lastly, but importantly, Beall '510 does not provide a container bottom having a concave-curvature. Instead, Beall '510 provides a container bottom that is convex and thus curved downwardly away from Beall's '510 snack pieces. Figure II of Beall '510 clearly shows their convex (and not concave-curved) container bottom.

Thus, based on the foregoing discussion Appellants' assert that several key elements are missing and that the Examiner's rejection based on anticipation has not been met. Appellants therefore respectfully request reconsideration and allowance of Claims 1, 3-5 and 10 over the Examiner's 35 U.S.C. § 102(b) rejection under Beall '510.

II. Whether the rejection of Claims 1, 3-5 and 10 under 35 U.S.C. § 102(b) as being anticipated by Beall (U.S. Patent No. 3,852,485) is proper?

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[5] Appellants' Specification, Figures 4, 5 and 9.
[6] Beall (U. S. Patent No. 3,956,510); col. 2, lines 17-22.
[7] Id. at col. 1, lines 20-29.
[8] Id. at col. 4, lines 35-39.

Claims 1, 3-5 and 10 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Beall (U.S. Patent No. 3,852,485--hereinafter Beall '485).

Similarly to Beall '510, the Examiner states that Beall '485 discloses a shaped container bottom integral to a container in combination with curved snack pieces therein, the snack pieces comprising a center radius, a center height, a peripheral edge an a lower surface. The Examiner further states that the snack pieces are located within a container, the container bottom comprising a bottom panel having a center radius, a center height and a concave-curvature about a first axis of the bottom panel. The Examiner concludes by stating that the concave-curvature substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of a lowest snack piece rests upon the bottom panel.

Also as in Beall '510, Beall '485 lacks several key elements of Appellants' claims, and in particular, Claim 1. First, Beall's snack pieces do not have Appellants' saddle height as an element, because Beall's snack pieces are not saddle shaped as are Appellants'. Next, the so-called curvature of the Beall '485 package does not conform to the curvature of Beall's snack pieces. Rather, the curvature of Beall's '485 package conforms only to the outer edge of the snack piece and not the inner curved region of Beall's '485 snack piece. Figure IV of Beall '485 shows their single-curved snack piece. Figure III shows that Beall's '485 snack pieces are fitted within one-another in a circular array such that the curved portions thereof never conform to the bottom panel of Beall's '485 package. In Appellants' view, the omission of this element is fatal. Furthermore, there is no 'lowest snack piece' in Beall '485 on which all other snack pieces are stacked. Instead, all of Beall's '485 snack pieces are stacked in the same plane and at the same height as each snack piece aligned in Beall's '485 circular array.[9]

Also, as noted above, Beall '485 rejects the possibility of stacking his snack pieces onto one-another and allows only for presentation of his snack pieces into a circular array; i.e., a closed loop.[10]

Lastly, but importantly, Beall '510 does not provide a container bottom having a concave-curvature. Instead, Beall '510 provides a container bottom that is convex and thus curved downwardly away from Beall's '510 snack pieces. Figure II of Beall '510 clearly shows their convex (and not concave-curved) container bottom.

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[9] Beall (U. S. Patent No. 3,956,510); Figure III.

[10] Beall (U.S. Patent No. 3,852,485); col. 2, lines 7-12: "It is an essential element of the present invention that the products to be packaged are thin and substantially uniform on both shape and size so they can be nested one within the other to form a loop, preferably, a closed loop. Preferably this closed loop is in the form of a circular array." [Emphasis added.]

Appellants therefore believe and assert that Beall '485 does not anticipate Appellants' claims. Thus, Appellants respectfully request reconsideration and allowance of Claims 1, 3-5 and 10 over the Examiner's 35 U.S.C. § 102(b) rejection under Beall '485.

III. Whether the rejection of Claims 1 and 3-20 under 35 U.S.C. § 102(b) as being anticipated by Baur, et al. (U.S. Patent No. 3,498,798) is proper?

Claims 1 and 3-20 are rejected under 35 U.S.C. § 102(b) as being anticipated by Baur, et al. (U.S. Patent No. 3,498,798--hereinafter, "Baur '798"). The Examiner asserts that Baur '798 discloses a package that defines a shaped container bottom for containing a plurality of curved snack pieces. The Examiner further asserts that the container bottom comprises a bottom panel that has a concave curvature wherein the concave curvature substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of the lowest snack piece of the plurality of snack pieces rests upon the base portions of the bottom panel.

Baur'798 does not teach or provide a shaped container bottom. The Examiner's contentions notwithstanding, Baur '798 neither teaches in their specification nor discloses in their figures a shaped container bottom of any sort nor one like Appellants'. Net, this key element is completely missing from Baur '798.

What the Examiner seems to be referencing are the snack chips shown in Figure 1 of Baur '798. However, the bottom snack piece is not shown to be resting on a shaped container bottom, nor does Baur '798 teach or disclose that its container bottom is shaped anywhere within its disclosure. In fact, at column 3, lines 56-58, Baur '798 states the following: "Although only top member 13 is shown, the seal and method shown and described are also applicable to bottom member 12." [Emphasis added.] In other words, the surface of bottom member 12 is flat and not curved and is the same as that for top member 13 which is also flat and not curved.

Thus, the bottom member 12 (which the Examiner asserts as being shaped) is not shown in any diagram of Baur '798 to be curved and instead teaches that bottom member 12 is flat and not curved similarly to top member 13. Add to that that the bottom of Baur '798 is not taught in its disclosure to be shaped or curved. Also, one of skill in the art would take the description of the bottom member of Baur '798 to be flat just like the top member 13 which is in fact flat and un-shaped.

To conclude, Appellants point out that the Examiner, in his rejection, points to no teaching or figure within Baur '798 to properly validate the rejection or substantiate his assertion that Baur '798 teaches or provides a container having a shaped container bottom.

Therefore, Appellants' respectfully contend that Baur '798 should be removed as an anticipatory reference against Appellants' claims and that Claims 1 and 3-20 should be allowed over the Examiner's 35 U.S.C. § 102(b) rejection under Baur '798.

IV. Whether the rejection of Claims 1, 3 and 4 under 35 U.S.C. § 102(b) as being anticipated by Ruiz (U.S. Patent No. 4,873,099) is proper?

Claims 1, 3 and 4 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Ruiz (U.S. Patent No. 4,873,099--hereafter, "Ruiz '099"). The Examiner states that Ruiz '099 discloses an edible shell or bowl defining a shaped container bottom, a plurality of bowls being packaged in a stacked array wherein the lowest positioned edible bowl defines the shaped bottom of all the other stacked edible bowls.

With regard to Ruiz '099, Appellants' invention comprises a shaped container bottom formed thusly to receive a plurality of curved snack pieces. The bottom panel of the container has a concave-curvature that substantially conforms to the curvature of the snack pieces. Furthermore, at least a portion of the peripheral edge of the lowest snack piece rests upon Appellants' bottom panel.

Ruiz '099 does not provide a package but merely shaped snack pieces that may be stacked into one-another; e.g., a stack of Pringles ® which the Examiner no longer asserts as anticipatory to Appellants' claims. Ruiz '099 does show a package into which Ruiz' edible bowls may be stacked having a container bottom that is completely planar (i.e., flat) and non-curved in any respect which is evident in Figures 5 and 6. Also, no part of the peripheral edge of the lowest edible product in Ruiz '099 touches or makes contact with the bottom panel of Ruiz's container.

Thus, Ruiz '099 does not teach a shaped container bottom in a container. Stacked edible items are not Appellants' container having a concave-curved container bottom.

Since those elements are missing, Appellants respectfully request reconsideration and allowance of Claims 1, 3-4 over the Examiner's 35 U.S.C. § 102(b) rejection under Ruiz '099.

V. Whether the rejections of Claims 6-9 under 35 U.S.C. § 103(a) as being unpatentable over Beall (U.S. Patent No. 3,956,510) in view of Beall (U.S. Patent No. 3,852,485) are proper?

The Examiner states that the Beall references disclose the invention except for the dimensional limitations. The Examiner then attempts to argue that a change in the saddle height of the Beall '510/'485 snack chips would have been obvious in order to improve stability--the Examiner's assertion though does not take into account the fact that the Beall '510/'485 snack

chaps are stacked horizontally in a loop and not vertically, a packaging configuration in which a snack pieces saddle height is important and necessary. Nor does the Examiner acknowledge that Beall's '510/'485 snack pieces do not possess a saddle height because they are single curved snack pieces and thus cannot, by virtue of their geometric configuration, have Appellants' saddle shaped snack pieces.

Appellants point out that to establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference must teach or suggest all of the claim limitations.[11]

Beall '510 and Beall '485 both lack several key elements that are neither taught or suggested by the references. For example, the so-called curvature of the Beall '510/'485 packages do not conform to the curvature of the Beall '510/'485 snack pieces. Rather, the curvature of the Beall '510/'485 packages conform only to the outer edge of the snack piece and not to the inner curved region of the Beall '510/'485 snack piece. Figure IV of both Beall '510 and Beall '485 show their single-curved snack piece. Figure III of both Beall '510 and Beall '485 show their snack pieces to be fitted within one-another in a circular array such that the curved portions thereof never conform to the bottom panel of the Beall '510/'485 package.

Furthermore, there is no 'lowest snack piece' in either of Beall '510 or Beall '485 on which all other snack pieces are stacked. Instead, all of Beall's '510 snack pieces are stacked in the same plane and at the same height as each snack piece aligned in the Beall '510/'485 circular array.[12] Also importantly, Neither Beall '510 or Beall '485 provides a container bottom having a concave-curvature. Instead, they provide only a container bottom that is convex and thus curved downwardly away from their snack pieces. Figure II of both Beall '510 and Beall '485 clearly show their convex (and not concave-curved) container bottoms.

Appellants therefore contend that since there is no suggestion or teaching of above discussed missing elements by either Beall '510 or Beall '485, the Examiner has not made a prima facie case of obviousness against Appellants' Claims 6-9. The Examiner's obviousness rejection on these grounds alone should be removed.

Additionally, Appellants respectfully assert that Beall '510 and Beall '485 both singly and combined teach away from Appellants' Claims 6-9. Appellants note that it is improper to

[11] In re Vaeck, 947 F. 2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).
[12] Beall (U. S. Patent No. 3,956,510); Figure III.

combine references where the references teach away from their combination.[13] Beall '510 states that more breakage occurs to chips when they are stacked one on top of the other.[14] In fact, Beall '510 points out that chips stacked vertically, because of their breakage issues, "do not normally meet with consumer acceptance."[15] Beall '510 then offers his solution to avoid stacking chips vertically by placing them in a looped configuration.[16] In fact, Beall '510 points out it has been found out by Beall '510 that chip breakage is reduced when the chips are supported on their edges.[17] Beall '485 states the same rationale and discussion for avoiding vertical stacking.[18]

Conversely, Appellants claim and show that their snack pieces are configured such that a "lowest snack piece" rests upon the concave-curvature of the bottom panel; i.e., Appellants' snack pieces are stacked. The fact that both Beall '510 and Beall '485 directly teach against and thus teach away from vertical stacking disqualifies them from proper consideration for a prima facie case of obviousness against Appellants' claims.[19]

Appellants therefore contend that the Examiner has stated a prima facie case of obviousness because 1) one of skill in the art would not be motivated to change the Beall '510/'485 device to create Appellants' invention because of the untaught and un-suggested missing elements noted above and 2) because both Beall '510 and Beall '485 teach away from Appellants' invention. Therefore, Appellants respectfully request reconsideration and allowance of Claims 6-9 over the Examiner's 35 U.S.C. § 103(a) rejection under Beall '510 in view of Beall '485.

VI. Whether the rejections of Claims 6-9 under 35 U.S.C. § 103(a) as being unpatentable over Baur, et al. (U.S. Patent No. 3,498,798) in view of Griffith (U.S. Patent No. 4,011,347) is proper?

Claims 6-9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Baur, et al. (U.S. Patent No. 3,498,798--hereinafter Baur '798) in view of Griffith (U.S. Patent No. 4,011,347--hereinafter Griffith '347).

The Examiner states that Baur '798 discloses the invention except for the bottom panel substantially conforming to the curvature of the snack pieces. The Examiner further states that Griffith '347 teaches a shaped container bottom formed by cushioning member 18 that conforms

[13] In re Grasselli, 713 F.2d 731, 743, USPQ 769, 779 (Fed. Cir. 1983).
[14] Beall (U.S. Patent No. 3,956,510); col. 1, lines 20-29.
[15] Id. at col. 1, line 29.
[16] Id. at col. 1, lines 34-43.
[17] Id. at col. 1, lines 34-35.
[18] Beall (U.S. Patent No. 3,852,485); col. 1, lines 20-33
[19] In re Grasselli, 713 F.2d 731, 743, USPQ 769, 779 (Fed. Cir. 1983).

to the curvature of the snack pieces. The Examiner then concludes that "[i]t would have been obvious to modify the bottom of Baur '798 to conform to the shape of the snack pieces in order to support the pieces such that movement is restricted and the stack of chips remains in a stable positioned centered within the container as motivated by less damage to the chips because the chips are moving less and the impact if any exist is minimized."

Appellants point out that to establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference must teach or suggest all of the claim limitations.[20]

Appellants respectfully contend that the Baur/Griffith combination does not produce Appellants' invention. Baur '798 does not teach or disclose a shaped container bottom whose bottom panel has a concave curvature about an axis. Baur '798 merely provides a tubular package for storing snack pieces. Griffith '347 provides a container bottom that curves downwardly away from the container thereby forming a convex curvature in their container bottom.[21] Furthermore, Griffith '347 does not teach or suggest that its cushioning member may be concave-curved or in any other configuration either in its specification or in its figures. Clearly, by providing a convex oriented shaped container bottom, Griffith's snack pieces are meant to be oriented differently than Appellants' orientation of their snack pieces.

The Baur/Griffith combination would therefore not produce Appellants' invention. It would produce a tubular package (Baur '798) having a convex shaped cushioning member (Griffith '347). Furthermore, there is no suggestion or motivation found in the Baur/Griffith combination that teaches or suggests to one of skill in e art to change the orientation of the cushioning member of Griffith '347 from a convex orientation to Appellants' concave-curved orientation. Therefore, the Baur/Griffith combination does not meet Appellants' invention which is a container having a shaped container bottom which configuration is concave-curved.

Thus, Appellants respectfully request reconsideration and allowance of Claims 6-9 over the Examiner's 35 U.S.C. § 103(a) rejection under Baur '798 in view of Griffith '347.

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[20] In re Vaeck, 947 F. 2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991).
[21] Griffith (U.S. Patent No. 4,011,347); Figures 1, 2, 3 and 3A.

SUMMARY

For the reasons set forth above, Appellants submit that the Examiner has not set forth the proper evidence for either of the 35 U.S.C. § 102(b) or §103(a) rejections. Accordingly, reversal of the Examiner's findings of unpatentability is respectfully requested.

FOR: MARY CARMEN GASCO, ET AL.

By_____
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July 1, 2004
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APPENDIX I

Appealed Claims: Application No. 10/010,818

1. A shaped container bottom integral to a container for containing a plurality of curved snack pieces, each snack piece having a center radius, a center height, a saddle height, a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel having a center radius, a center height, and a concave-curvature about a first axis of the bottom panel, wherein the concave-curvature of the bottom panel substantially conforms to the curvature of the snack pieces and at least a portion of the peripheral edge of a lowest snack piece of the plurality of snack pieces rests upon the bottom panel.

3. The container bottom according to claim 1, wherein the concave-curvature is downwardly curved about the first axis.

4. The container bottom according to claim 3, wherein the first axis is a major axis of the bottom panel.

5. The container bottom according to claim 3, wherein the curvature of the bottom panel conforms to the curvature of the plurality of snack pieces whereby the peripheral edge of the lowest snack piece substantially rests upon the bottom panel.

6. The container bottom according to claim 1, wherein the saddle height of the snack piece is from about 0.5 mm to about 30 mm greater than the center height of the bottom panel.

7. The container bottom according to claim 6, wherein the center height of the bottom panel is from about 2 mm to about 40 mm.

8. The container bottom according to claim 6, wherein the center radius of the bottom panel is not more than about 60 mm.

9. The container bottom according to claim 8, wherein the center radius of the bottom panel is from about 15 mm to about 35 mm.

10. The container bottom according to claim 1, wherein the bottom panel has a second upwardly concave-curvature about a second axis of the bottom panel.

11. A shaped container bottom for containing a plurality of curved snack pieces, each snack piece having a saddle height, a peripheral edge and a lower surface, within a container, the container bottom comprising a bottom panel comprising at least two base portions and

a bottom panel center disposed between the base portions, the bottom panel center having a center height and a concave curvature about a first axis of the container, wherein the concave-curvature of the bottom panel substantially conforms to the curvature of the snack pieces and a peripheral edge of a lowest snack piece of the plurality rests upon the base portions.

12. The container bottom according to claim 11, wherein the concave-curvature is downwardly curved about the first axis.

13. The container bottom according to claim 11, wherein the bottom panel has a second upwardly concave-curvature about a second axis of the bottom panel.

14. The container bottom according to claim 13, wherein the first axis is a major axis of the bottom panel.

15. The container bottom according to claim 11, wherein the bottom comprises two base portions each base portion being substantially flat and having a width greater than 0 mm.

16. The container bottom according to claim 11, wherein the curvature of the bottom panel center conforms to the curvature of the plurality of snack pieces whereby the peripheral edge of the lowest snack piece substantially rests upon the bottom panel center.

17. The container bottom according to claim 11, wherein the container bottom is thermoformed.

18. The container bottom according to claim 11, wherein the saddle height of the snack piece is from about 0.5 mm to about 30 mm greater than the center height of the bottom panel.

19. A container comprising the container bottom of claim 1.

20. A container comprising the container bottom of claim 11.